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Article 22

# Gonzales v. Raich: Political Safeguards up in Smoke?

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# *GONZALES V. RAICH*: POLITICAL SAFEGUARDS UP IN SMOKE?

> The subject to which the [commerce] power is next applied, is to commerce "among the several States." . . .
>
> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and *is certainly unnecessary*.[1]

## INTRODUCTION

How far the Supreme Court has come from this initial construction of the Commerce Clause offered by Chief Justice John Marshall. The Court's current understanding is, if not wholly inconsistent with where it stood nearly two centuries ago, decidedly more permissive.[2] While intrastate activities such as manufacturing were once held beyond the scope of federal power,[3] this is no longer the case. The Court now readily defers to Congress's use of the Commerce Clause as grounds for regulating intrastate issues ranging from prejudice[4] to the buying and selling of cut flowers.[5] In the late 1990s, a pair of cases invalidating commerce legislation[6] suggested an end to the Court's capitulation. But the recent decision in *Gonzales v. Raich*,[7] upholding the application of federal commerce legislation to intrastate medicinal marijuana use, exposed those cases as outliers in a larger pattern of deference to Congress.

One rationale the Court has offered for this trend of acquiescence is that of "political safeguards." This theory holds that the presence of

1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (emphasis added).

2. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 125–30 (2001) (discussing judicial interpretation of the Commerce Clause through the 1930s); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443–54 (1987) (discussing how the Court "systematically removed" previous limitations on the Commerce Clause between 1937 and 1942).

3. United States v. E.C. Knight Co., 156 U.S. 1, 12–13 (1895) (holding that federal antitrust laws regulating commerce could not reach merger of manufacturers because "[c]ommerce succeeds to manufacture, and is not a part of it").

4. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000h-6 (2000).

5. Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, 7 U.S.C. §§ 6801–6814 (2000).

6. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

7. 545 U.S. 1 (2005).

state representatives in Congress inherently protects against the unwarranted expansion of federal power.[8] But there are many reasons why members of Congress may have incentives to augment federal power beyond its constitutional reach.[9] And although state and local governments theoretically present an additional level of protection,[10] there are situations in which the states themselves have incentives to welcome the intrusion. In these cases, the individual values that federalism serves[11] can be sacrificed in the interest of governmental convenience, and relying on political safeguards to protect the federal balance looks like letting the fox guard the henhouse.[12] The Controlled Substances Act (CSA)[13] at issue in *Raich* implicated all of these issues.

This Note addresses the Court's decision in *Gonzales v. Raich*. Part II reviews the Court's Commerce Clause jurisprudence and discusses how the political safeguards theory has informed the increasing deference given to Congress.[14] It explains how the themes of safeguards and deference laid the groundwork for the Court's decision in *Raich*. Part III recounts the setting of *Raich*, as well as the Court's decision.[15] Part IV critiques the Court's acceptance of the Government's asserted basis for the CSA and argues that the political safeguards the Court relied on may have failed in this case.[16] Part V discusses how *Raich* could allow Congress to exercise the commerce power at the expense of the federal balance.[17] It also discusses how federalism's value to

8. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Because the political system protects the federal balance, the theory goes, the Court does not have to. In addition to Professor Wechsler, there are many other proponents of this theory in the scholarly community. *See, e.g.*, Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

9. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1522 (1994).

10. *See id.* at 1515–16.

11. *See* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 135–39 (2001); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106–12 (2004).

12. *Cf.* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1835 (2005). Although Professor Young used the analogy to describe relying on Congress to limit itself, relying on the states to limit Congress—particularly where they have every incentive *not* to do so—creates a similar situation.

13. 21 U.S.C. §§ 801–904 (2000).

14. *See infra* notes 19–123 and accompanying text.

15. *See infra* notes 124–206 and accompanying text.

16. *See infra* notes 207–298 and accompanying text.

17. *See infra* notes 299–319 and accompanying text.

individuals—exemplified by the plaintiffs in *Raich*—was undermined by the CSA.[18]

## II. COMMERCE CLAUSE JURISPRUDENCE

The Court's Commerce Clause jurisprudence is the product of over two centuries of evolution. The Court adopted a limited interpretation of the Commerce Clause in early cases.[19] A shift in attitude and broader vision accompanied the post-Depression New Deal era of the 1930s.[20] In the ensuing years, the theory of political safeguards evolved as a justification for the Court's permissive attitude towards commerce legislation.[21] But recent decisions created doubt as to whether that attitude would continue.[22]

### *A. Early Commerce Clause Decisions*

The Court first interpreted the Commerce Clause in *Gibbons v. Ogden*.[23] *Gibbons* involved a New York statute governing steamboat operating permits, which contravened an act of Congress governing fishing licenses.[24] The Court defined the extent of the commerce power, noting that "commerce" referred to "commercial intercourse between nations, and parts of nations"[25] and did not extend to "that commerce . . . which is carried on between man and man in a State . . . and which does not extend to or affect other States."[26] The power was "restricted to that commerce which concerns more States than one"[27] and thus had a limited scope.[28] This restriction persisted in the *Lottery Case*,[29] which upheld a statute prohibiting the transport of lottery tickets across state lines as within the commerce power.[30] The statute did not violate the Tenth Amendment, in part because "Congress . . . [did] not assume to interfere with traffic or commerce in lottery tick-

18. *See infra* notes 320–333 and accompanying text.
19. *See infra* notes 23–37 and accompanying text.
20. *See infra* notes 38–63 and accompanying text.
21. *See infra* notes 64–82 and accompanying text.
22. *See infra* notes 83–123 and accompanying text.
23. 22 U.S. (9 Wheat.) 1 (1824).
24. *Id.* at 1–3.
25. *Id.* at 189–90.
26. *Id.* at 194.
27. *Id.*
28. *See* Epstein, *supra* note 2, at 1402. *But cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 232 (1978) (suggesting that *Gibbons* interpreted the commerce power to reach "*all* activity having *any* interstate impact—however indirect" (emphasis added) (quoted in Epstein, *supra* note 2, at 1402)).
29. 188 U.S. 321 (1903).
30. *Id.* at 355.

ets *carried on exclusively within the limits of any State.*"[31] Despite upholding the statute, the Court still felt it was the judiciary's role to determine whether Congress's actions exceeded its power under the Commerce Clause.[32]

The Court's willingness to fulfill that duty would soon be tested. In the years following the *Lottery Case*, the Court searchingly evaluated federal actions, often relying on arbitrary and manipulable distinctions between "manufacture" and "commerce,"[33] or "direct" and "indirect" effects on commerce.[34] But the limits on federal power that accompanied those distinctions collided with an economy struggling to recover from the Great Depression and President Franklin Roosevelt's efforts to speed that recovery through extensive economic regulation.[35] After the Court invalidated portions of Roosevelt's National Industrial Recovery Act (NIRA),[36] the President threatened to "pack" the Court with new appointees to achieve more favorable treatment of his legislation.[37]

### *B. Commerce and the New Deal*

The change in the Court's approach to the commerce power was immediate,[38] and the result was a series of cases that "systematically removed each of the previous limitations on the scope of the commerce clause."[39] The Court first abandoned its commerce/manufac-

31. *Id.* at 357 (emphasis added).

32. *See id.* at 363.

33. *See* Carter v. Carter Coal Co., 298 U.S. 238, 301 (1936) ("That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause.").

34. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) ("In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.").

35. *See* Douglas H. Ginsburg, *On Constitutionalism*, *in* CATO SUPREME COURT REVIEW 2002–2003, at 7, 16 (James L. Swanson ed., 2003) ("During the 1930s, President Roosevelt proposed and the Congress enacted New Deal legislation in the teeth of the Court's prior decisions explicating the limits of the written Constitution. In effect, the President and the Congress dared the Court to strike down laws with strong popular support.").

36. *See A.L.A. Schechter Poultry Corp.*, 295 U.S. 495; Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).

37. Ginsburg, *supra* note 35, at 16.

38. Some believe that the Court was attempting to appease President Roosevelt and avoid the Court-packing plan. *See id.* Others argue that the Court was merely returning to the understanding of the commerce power espoused in *Gibbons*. BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 259 (1998). For a good overview of the debate, see Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2168–85 (1999).

39. Epstein, *supra* note 2, at 1443.

ture distinction,[40] ruling that even activities that "may be *intrastate* in character when separately considered" may be regulated by Congress "if they have such a *close and substantial relation* to interstate commerce that their control is essential or appropriate" to the exercise of the commerce power.[41] The Court next upheld the Fair Labor Standards Act (FLSA), a federal ban on the interstate transportation of goods that were not produced in accordance with particular wage and hour requirements.[42] Validating the federal regulation of intrastate labor standards,[43] the Court stated that the commerce power reached even "activities intrastate which *so affect interstate commerce* or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end."[44]

The Court's New Deal-era cases expanded Congress's power to control interstate commerce. Intrastate activities could be regulated if they bore a "close and substantial relation to interstate commerce,"[45] or if their products were intended to enter interstate commerce.[46] The Court next approved congressional efforts to set minimum prices for the sale of commodities produced and consumed entirely intrastate,[47] on the grounds that intrastate sales burdened interstate commerce in those commodities.[48] The final, and most important,[49] piece of the Commerce Clause puzzle came shortly thereafter.

*Wickard v. Filburn*[50] involved federal efforts to limit the amount of wheat grown by commercial farmers in an effort to stabilize the national wheat market.[51] Farmer Filburn was penalized for growing

40. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *Jones & Laughlin* involved the National Labor Relations Act, which established and protected unions' right to collectively bargain, in part on the basis that employers' denial of that right "materially affect[ed]" commerce. *Id.* at 23 n.2.

41. *Id.* at 37 (emphasis added). The Court's shift in approach was apparent—this interpretation had been the basis for Justice Benjamin Cardozo's dissent in *Carter Coal* less than a year earlier. 298 U.S. 238, 327 (1936) (Cardozo, J., dissenting).

42. United States v. Darby, 312 U.S. 100, 109–10 (1941). Citing the *Lottery Case*, the Court upheld Congress's power to prohibit altogether interstate traffic in a particular article of commerce. *Id.* at 113. The Court also upheld the FLSA's requirement that producers of goods for interstate commerce keep records to verify compliance with the labor standards. *Id.* at 124–25.

43. *Id.* at 121.

44. *Id.* at 118 (emphasis added).

45. *Jones & Laughlin*, 301 U.S. at 37.

46. *Darby*, 312 U.S. at 122.

47. *See* United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942).

48. *Id.* at 120–21 ("[T]he unregulated sale of the intrastate milk tends to reduce the sales price received by handlers and the amount which they in turn pay to producers.").

49. *See generally* Jim Chen, Filburn's *Legacy*, 52 EMORY L.J. 1719 (2003).

50. 317 U.S. 111 (1942).

51. *Id.* at 114–15.

wheat in excess of his allotted quota.[52] Filburn emphasized that the wheat he had grown was for personal use and its effect on interstate commerce was "indirect."[53] The Court distilled its previous measures of the commerce power into a new standard: economic effect.[54] If an activity "exert[ed] a substantial economic effect on interstate commerce," indirect or otherwise, it was within congressional reach.[55] The Court noted that even though Filburn's individual effect on commerce was "trivial," his actions were still within the reach of the commerce power "where, as here, his contribution, *taken together with that of many others similarly situated*, is far from trivial."[56] Using this logic, the commerce power could reach actions, intrastate or otherwise, that individually had "minuscule or no effect upon interstate commerce at all."[57]

This aggregation principle greatly expanded the range of activities that Congress could reach. As one scholar noted, "[M]ost of what we do, indeed all our actions in the market, have effects that extend beyond our immediate vicinity, especially when considered in the aggregate."[58] Thus, the aggregation principle effectively "granted Congress a near plenary power to do anything it wills" in its exercise of the commerce power.[59] For years, the Court seemed to sanction such exercise. The Court upheld the federal prohibition on discrimination in hotels on the grounds that such discrimination, in the aggregate, discouraged blacks from traveling interstate, affecting interstate commerce.[60] It upheld the prohibition on discrimination in restaurants serving interstate patrons or preparing food that had moved interstate.[61] And it upheld the prohibition of intrastate loan-sharking,

52. *Id.*

53. *Id.* at 119.

54. *Id.* at 124–25.

55. *Id.* at 125.

56. *Wickard*, 317 U.S. at 127–28 (emphasis added). This would become the most recognized language from *Wickard*. Chen, *supra* note 49, at 1743. As Professor Chen points out, however, this "aggregation" principle was not original to *Wickard*; that case merely crystallized what had been hinted at in preceding cases. *Id.* at 1744 & nn.193–94 (citing United States v. Darby, 312 U.S. 100, 123 (1941) ("[I]n present day industry, competition by a small part may affect the whole and . . . the total effect of the competition of many small producers may be great." (alterations in original)) and NLRB v. Fainblatt, 306 U.S. 601, 606 (1939) ("The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.")).

57. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 314 (2004).

58. *Id.* at 314–15.

59. *Id.* at 315.

60. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

61. *See* Katzenbach v. McClung, 379 U.S. 294 (1964).

finding that the revenue it produced went largely to fund organized crime, which in turn affected interstate commerce through various interstate activities.[62] The Court indicated that it would validate federal commerce regulations as long as Congress had a "rational basis" for determining that the regulated conduct affected commerce.[63]

### C. *The Commerce Clause and the Political Safeguards of Federalism*

One reason the Court began deferring to Congress in its exercise of the commerce power was that it embraced the idea of the "political safeguards of federalism." The political safeguards theory first garnered support when Professor Herbert Wechsler published his seminal article in 1954.[64] Wechsler argued that the structure of the federal government, securing the role of the states in the "selection and the composition of the national authority," was suitably equipped to restrain federal intrusions into the states' domain.[65] In deciding the proper federal-state balance, the Court should resolve disputes only where Congress had not spoken.[66] One proponent of the theory even suggested that questions of federal action violating states' rights "should be treated as *nonjusticiable*."[67]

The Court has not yet accepted that particular invitation, but it has certainly recognized—and to some extent, endorsed[68]—the notion of

62. *See* Perez v. United States, 402 U.S. 146 (1971).

63. Under this test, the Court will defer to Congress's finding that a particular activity being regulated affects interstate commerce, so long as there is some rational relationship linking the activity to commerce which could allow for such a finding. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276–77 (1981); *Heart of Atlanta Motel*, 379 U.S. at 258. The rational basis test does not seem to require that the statute at issue be constitutional, but only that Congress reasonably believed that it was. Because of this, it has been suggested that this standard "underenforces" the constitutional limits of the Commerce Clause, and thus serves, on occasion, to uphold unconstitutional laws. *See* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1653 (2005).

64. Wechsler, *supra* note 8.

65. *Id.* at 546, 558.

66. *See id.* at 560. Wechsler asserted that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress." *Id.* at 559.

67. Choper, *supra* note 8, at 1557 (emphasis added). Professor Choper suggested that beneficiaries of *individual* rights are less likely to be represented in the political process; thus, judicial intervention is necessary to produce a fair constitutional judgment with respect to those rights. Because the *states'* interests in the federal balance are represented in Congress, however, the "democratic tradition" is best advanced by allowing "popularly responsible institutions" to determine that balance. *Id.* at 1556–57.

68. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1321–34 (1997) (discussing the Court's "willing embrace of the political safeguards argument").

political safeguards. In *Garcia v. San Antonio Metropolitan Transit Authority*,[69] the Court upheld the application of the FLSA to a municipally owned and operated mass-transit system.[70] Less than ten years earlier, the Court had ruled that enforcing the FLSA against the states "in areas of traditional governmental functions" unconstitutionally violated principles of federalism.[71] In overruling that decision, the *Garcia* Court relied on the political safeguards of federalism.[72] The Court, citing Wechsler and other political safeguards advocates,[73] noted that "the political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause."[74]

After the NIRA cases of the mid-1930s,[75] it was nearly sixty years before the Court again invalidated a federal statute on Commerce Clause grounds.[76] The Court did, however, strike down commerce legislation on *federalism* grounds. *New York v. United States*[77] and *Printz v. United States*[78] both invalidated commerce power legislation that "commandeered" state and local officials into implementing federally crafted regulatory schemes. The Court rejected such legislation as "fundamentally incompatible with our constitutional system of dual sovereignty."[79] In both cases, the Court was concerned with political accountability; citizens would not know which government (federal or state) to credit or blame for the legislation.[80] But the Court would

69. 469 U.S. 528 (1985).

70. *Id.* at 555.

71. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by Garcia*, 469 U.S. 528.

72. *Garcia*, 469 U.S. at 552.

73. *Id.* at 551 n.11. Wechsler's article had been cited in *National League of Cities* as well—in Justice Brennan's dissent. 426 U.S. at 877 (Brennan, J., dissenting).

74. *Garcia*, 469 U.S. at 553–54.

75. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).

76. Invalidating a statute on Commerce Clause grounds means that a regulation exceeded Congress's power under the Commerce Clause. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); Antony Barone Kolenc, Note, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867, 870 n.17 (1998).

77. 505 U.S. 144 (1992). *New York v. United States* involved a federal statute that required state governments to provide for disposal, in a manner prescribed by Congress, of any low-level radioactive waste that the state produced, or be forced to "take title" to the waste and become liable for any damage it caused. *Id.* at 151–54.

78. 521 U.S. 898 (1997). *Printz* involved a statute requiring "chief law enforcement officer[s]" of local jurisdictions to administer federally mandated background checks on prospective handgun purchasers. *Id.* at 902–03.

79. *Id.* at 935.

80. *See id.* at 930 (noting that commandeering lets Congress get credit for solving problems while forcing states to absorb the cost, and forces states to take the blame for any burden imposed by the legislation); New York v. United States, 505 U.S. at 168 ("[W]here the Federal

address those issues only when federal legislation explicitly required state or local governmental action; commerce laws that were "generally applicable" would face only rational basis, Commerce Clause review.[81]

So it seemed that, at least for generally applicable commerce legislation, the Court would continue to defer to Congress and rely on political safeguards. But as the links to commerce offered by Congress grew more attenuated,[82] the Court appeared to adopt a more demanding standard.

### *D. The Modern Era of the Commerce Clause*

In *United States v. Lopez*,[83] the Court invalidated the Gun-Free School Zones Act of 1990 (GFSZA),[84] which made the possession of a firearm in a school zone a federal crime.[85] The Court set forth "three broad categories of activity" that were within the scope of the commerce power:[86] the "use of the channels of interstate commerce";[87] the regulation and protection of "the instrumentalities of interstate commerce, or persons or things in interstate commerce";[88] and the authority to regulate "those activities that substantially affect interstate commerce."[89] The Court summarized the "substantial effects"

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Government compels States to regulate, the accountability of both state and federal officials is diminished.").

81. *Compare* New York v. United States, 505 U.S. at 177–78, *with* Reno v. Condon, 528 U.S. 141, 151 (2000) (upholding the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721–2725 (2000), which regulated the sale and disclosure of driver's license information acquired by the states). The *Reno v. Condon* Court distinguished *New York v. United States* on the grounds that the DPPA "does not require the States . . . to regulate their own citizens," but rather regulated "the States as the owners of data bases." Reno v. Condon, 528 U.S. at 151. Although it is not clear what standard of review was applied in *New York v. United States* or *Printz*, commentators have recognized that the Court applied a more stringent standard than "rational basis." *See* Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment*, 53 U. MIAMI L. REV. 71, 156–59 (1998).

82. *See* March D. Coleman, Comment, *A Step Backwards: Carjacking and the Commerce Clause*, 16 J.L. & COM. 113, 128 (1996).

83. 514 U.S. 549 (1995).

84. 18 U.S.C. § 922(q)(1)–(3) (1994).

85. *Id.* § 922(q)(1)(A).

86. *Lopez*, 514 U.S. at 558–59.

87. *Id.* at 558. Examples of this include the statutes at issue in the *Lottery Case* and *Darby*, which prohibited certain items from moving in interstate commerce altogether.

88. *Id.* This ranges from the power to set intrastate railroad rates in the *Shreveport Rate Cases*, see *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914), to the power to criminalize thefts from interstate shipments, see 18 U.S.C. § 659 (2000), to the power to criminalize the destruction of any aircraft employed in interstate commerce, see *id.* § 32.

89. *Lopez*, 514 U.S. at 558–59.

cases as allowing Congress to reach only *economic* activity.[90] This brand new requirement[91]—the economic character of the regulated activity—was the first basis on which the Court found fault with the GFSZA: it was a criminal statute that did not regulate "commerce or any sort of economic enterprise."[92] Because it was not an essential part of a larger regulatory scheme that "could be undercut unless the intrastate activity were regulated,"[93] the GFSZA was not valid under the substantial effects prong.[94] The Court noted that the GFSZA contained no "jurisdictional element" that would ensure that "the firearm possession in question affects interstate commerce."[95] Finally, Congress had offered no formal findings to help the Court see how gun possession in school zones substantially affected interstate commerce when the connection was not otherwise apparent.[96]

The Government argued that gun possession in school zones substantially affected interstate commerce, not only because insurance costs may spread interstate,[97] but also because school violence might threaten the educational process and ultimately lead to a "less productive citizenry."[98] The Court noted that the "costs of crime" reasoning would allow Congress to regulate all violent crime or activities "that might *lead* to violent crime, regardless of how tenuously they relate to interstate commerce."[99] And under the "national productivity" argument, Congress could regulate anything that might conceivably relate to an individual's economic productivity, including family law or education.[100] The Government's reasoning would leave the Court "hard pressed to posit any activity by an individual that Congress is without

90. *Id.* at 559–60 (citing Perez v. United States, 402 U.S. 146 (1971) and Wickard v. Filburn, 317 U.S. 111 (1942)).

91. Indeed, the Court's consideration of the economic nature of the activity in *Lopez* was almost directly contradictory to *Wickard*. *See Wickard*, 317 U.S. at 125 (noting that even if Filburn's activity "may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce" (emphasis added)).

92. *Lopez*, 514 U.S. at 561 (internal quotation marks omitted).

93. *Id.*

94. *Id.*

95. *Id.* The existence of a jurisdictional element—for example, limiting the scope of the GFSZA to possession of guns that had moved in interstate commerce—moves the analysis of a statute from the substantial effects prong to one of the more lenient "channels" or "instrumentalities" prongs. *See* Diane McGimsey, Comment, *The Commerce Clause and Federalism After* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1679–81 (2002).

96. *Lopez*, 514 U.S. at 562–63.

97. *Id.* at 564.

98. *Id.* The decreased productivity, the Government argued, "would have an adverse effect on the Nation's economic well-being." *Id.*

99. *Id.* (emphasis added).

100. *Id.*

power to regulate,"[101] and would thus convert "the Commerce Clause to a general police power of the sort retained by the States."[102]

Five years later, in *United States v. Morrison*,[103] the Court invalidated a provision of the Violence Against Women Act (VAWA)[104] that created "a federal civil remedy for the victims of gender-motivated violence."[105] Reiterating its reasoning in *Lopez*,[106] the Court identified four "significant considerations" that affected its judgment: the economic nature of the activity;[107] the presence of a jurisdictional element;[108] the existence of congressional findings;[109] and whether the link to commerce was "attenuated."[110] The Court suggested that when the activity being regulated was not economic in nature, Congress could not aggregate its effects to demonstrate a substantial impact on commerce.[111] The VAWA failed on all four counts: gender-motivated violence was not economic;[112] the VAWA contained no "jurisdictional element" that could demonstrate how the legislation was tied to interstate commerce;[113] the findings were insufficient to uphold the legislation;[114] and the link between the regulated conduct and commerce was as attenuated as that in *Lopez*.[115]

*Lopez* and *Morrison* represented an unexpected shift in Commerce Clause jurisprudence[116] following over half a century during which the Court did not invalidate any commerce legislation.[117] The Court's attitude towards Commerce Clause legislation marked a significant change; the "rational basis" test of old[118] seemed to have been re-

101. *Lopez*, 514 U.S. at 564.

102. *Id.* at 567.

103. 529 U.S. 598 (2000).

104. 42 U.S.C. § 13981 (2000).

105. *Morrison*, 529 U.S. at 601–02.

106. In fact, much of the *Morrison* opinion came from *Lopez*. *See id.* at 610–18.

107. *Id.* at 609–10.

108. *Id.* at 611–12.

109. *Id.* at 612.

110. *Id.*

111. *Morrison*, 529 U.S. at 613.

112. *Id.*

113. *Id.*

114. *Id.* at 614 (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)). The Court thought the findings were weak because they relied on reasoning that had been "rejected as unworkable" in *Lopez*. *Id.* at 615.

115. *Id.*

116. Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After* Lopez *and* Morrison, 11 WM. & MARY BILL RTS. J. 403, 436 (2002).

117. *See* Kolenc, *supra* note 76, at 870 n.17.

118. *See supra* note 63 and accompanying text.

placed with a stricter,[119] four-part "considerations" test.[120] Because the *Lopez-Morrison* test focused on the nature (economic or not) of the activity at issue, the way the Court *defined* the activity took on greater significance.[121] The Court seemed more willing to exert its power to protect the boundaries of federalism[122] and less inclined to abdicate its review and rely on political safeguards.[123] The question was how long this trend would last.

## III. SUBJECT OPINION: *GONZALES V. RAICH*

The *Raich* decision had been a long time coming. It was the latest product of the decades-old struggle between federal legislators and individuals over the legality of marijuana use.[124] Recognition of that struggle may well have factored into the Court's decision.[125] This Part recounts the background and application of the CSA and reviews the Court's opinion in *Raich*.

### *A. Angel Raich and Diane Monson Take on the CSA*

In 1970, Congress enacted the Controlled Substances Act (CSA), which categorizes all "controlled substances" into five schedules.[126] Marijuana is classified as a Schedule I substance,[127] meaning it has a high potential for abuse and no safe or acceptable medicinal use.[128] Because of this classification, the CSA prohibits the manufacture, distribution, or possession of marijuana.[129] Several efforts have been made to transfer marijuana to a less restrictive schedule, but to no avail.[130]

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119. Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 615–16 (2001).

120. *See Morrison*, 529 U.S. at 609.

121. Samantha Everett, Note, Raich v. Ashcroft: *Medical Marijuana and the Revival of Federalism*, 41 SAN DIEGO L. REV. 1873, 1892 (2004).

122. *See* United States v. Lopez, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring); *id.* at 580 ("The [GFSZA] . . . upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and *our intervention is required.*" (emphasis added)); Michael Keenan, *Is* United States v. Morrison *Antidemocratic?: Political Safeguards, Deference, and the Countermajoritarian Difficulty*, 48 How. L.J. 267, 269 (2004).

123. *See Morrison*, 529 U.S. at 616 n.7. *But see id.* at 649 (Souter, J., dissenting) (noting that "the Constitution remits [conflicts of sovereign political interests implicated by the Commerce Clause] to politics").

124. *See infra* notes 126–157 and accompanying text.

125. *See infra* notes 158–206 and accompanying text.

126. 21 U.S.C. § 812 (2000).

127. *Id.* § 812(c).

128. *Id.* § 812(b)(1).

129. *Id.* §§ 823(f), 844(a).

130. *See, e.g.*, H.R. 2087, 109th Cong. (1st Sess. 2005).

In the years since the CSA was enacted, several states, including California, have passed legislation legalizing marijuana for personal, medicinal use under the supervision of a physician.[131] California's Compassionate Use Act of 1996 (CUA)[132] provides that state laws regarding marijuana cultivation and possession do not apply to those who possess or cultivate it for physician-recommended medicinal purposes.[133] Angel Raich and Diane Monson, two California residents, began using marijuana for medicinal purposes pursuant to their doctors' recommendations.[134] The women suffer from an unfathomable range of physical maladies[135] that their physicians were unsuccessful in treating with conventional medicine.[136] Both physicians recommended the use of marijuana as an alternative.[137] Raich's physician believed that denying her the use of marijuana for medicinal purposes would prove fatal.[138] Monson cultivated the marijuana herself, while Raich's marijuana was provided by caregivers at no charge.[139]

On August 15, 2002, county deputy sheriffs, as well as Drug Enforcement Agency (DEA) agents, arrived at Monson's home.[140] The DEA agents, acting pursuant to the CSA, seized and destroyed all of her marijuana plants.[141] Raich and Monson brought suit, seeking an injunction and declaratory judgment against enforcement of the CSA on the grounds that, as applied to them, the CSA was an unconstitutional exercise of the commerce power.[142] The district court denied their motion for a preliminary injunction,[143] finding that the women could not show that they were likely to prevail on the merits.[144]

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131. Gonzales v. Raich, 545 U.S. 1, 5 (2005).

132. CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2006).

133. *Id.* § 11362.5(d).

134. *Raich*, 545 U.S. at 6–7.

135. Raich's own ailments include scoliosis, temporomandibular joint dysfunction, endometriosis, nonepileptic seizures, and an inoperable brain tumor. The symptoms include chronic pain, life-threatening weight loss, nausea, and one episode of paralysis. Brief for Respondents at 4, *Raich*, 545 U.S. 1 (No. 03-1454). Monson's condition is comparatively milder, limited to a degenerative disease of the spine, and the "chronic back pain and constant painful muscle spasms" that accompany it. *Id.* at 5.

136. *Raich*, 545 U.S. at 7.

137. *Id.*

138. *Id.*

139. *Id.* Raich's ailments render her physically unable to cultivate her own marijuana. *Id.*

140. *Id.*

141. *Raich*, 545 U.S. at 7. The county officials determined that her possession was legal under the CUA. *Id.*

142. *Id.* at 7–8. Raich and Monson also brought a substantive due process claim, which was not addressed by the lower courts. *Id.*

143. Raich v. Ashcroft, 248 F. Supp. 2d 918, 931 (N.D. Cal. 2003).

144. *Id.*

The Court of Appeals for the Ninth Circuit reversed.[145] The CSA applies to *all* marijuana possession.[146] But the Ninth Circuit found that as applied to Raich and Monson, the CSA was seeking to reach "a separate and distinct class of activities,"[147] namely "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law."[148] Relying on *Lopez*, the Ninth Circuit found that such activity was not economic in nature;[149] thus, under *Morrison*, it could not be aggregated to show a substantial impact on commerce.[150] After noting the lack of a jurisdictional element,[151] the absence of congressional findings specific to medicinal marijuana,[152] and what it deemed an attenuated connection to commerce,[153] the Ninth Circuit found that the CSA was "likely unconstitutional" as applied to Raich and Monson.[154]

The Court granted certiorari.[155] The case presented an opportunity for the Court to test its newfound scrutiny of commerce legislation and further elucidate how the Court differentiates between economic and noneconomic activity.[156] It also presented an opportunity to see whether the Court's past reliance on political safeguards, relegated to the dissent in *Morrison*,[157] would find favor with a majority once again.

### *B. Your Winner, by Split Decision: The CSA*

The Court upheld the CSA's application to Raich and Monson by a 6 to 3 vote. Justice John Paul Stevens wrote the Court's opinion.[158] Justice Antonin Scalia filed a concurring opinion,[159] and Justices Sandra Day O'Connor[160] and Clarence Thomas[161] each filed a dissent.

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145. Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).
146. 21 U.S.C. §§ 823(f), 844(a) (2000).
147. *Raich*, 352 F.3d at 1228 (emphasis omitted).
148. *Id.*
149. *Id.* at 1230.
150. *Id.* at 1230–31.
151. *Id.* at 1231.
152. *Id.* at 1231–33.
153. *Raich*, 352 F.3d at 1233.
154. *Id.* at 1234.
155. 542 U.S. 936 (2004).
156. *See* Catherine Laughlin, *U.S. Supreme Court Hears Oral Arguments in* Ashcroft v. Raich *Background*, 33 J.L. MED. & ETHICS 396, 397 (2005).
157. United States v. Morrison, 529 U.S. 598, 649 (2000) (Souter, J., dissenting).
158. *See infra* notes 162–185 and accompanying text.
159. *See infra* notes 186–195 and accompanying text.
160. *See infra* notes 196–206 and accompanying text.
161. *See infra* note 206.

### 1. *The Court's Opinion*

Justice Stevens, writing for the majority, held that "[t]he CSA is a valid exercise of federal power, even as applied" to Raich and Monson.[162] The Court noted that Congress had enacted a "closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance" except in accordance with the CSA's schedules.[163] The *general* validity of the CSA was not at issue; rather, the challenge was limited to the CSA's prohibition on marijuana possession "*as applied* to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law."[164]

Placing the case in the substantial effects prong of commerce legislation,[165] the Court noted that Congress has the power to regulate "purely local" activities that are within the "class of activities that have a substantial effect on interstate commerce."[166] Congress was not required "to legislate with scientific exactitude"; if it determined that the "total incidence of a practice" affected interstate commerce, it could regulate the entire class.[167]

The Court likened the case to *Wickard*, noting that both the CSA and the regulation in *Wickard* aimed to "control the supply and demand" of fungible commodities—respectively, marijuana and wheat.[168] In both cases, Congress had a rational basis for concluding that the failure to regulate home-consumed products "would have a substantial influence on price and market conditions."[169] As in *Wickard*, Congress could similarly conclude that high demand could draw homegrown marijuana into the interstate market, frustrating the federal interest in excluding marijuana from that market altogether.[170] The fact that *Wickard* dealt with the "protect[ion] and stabiliz[ation]"

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162. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

163. *Id.* at 13.

164. *Id.* at 15 (emphasis added).

165. *Id.* at 17.

166. *Id.* (internal quotation marks omitted) (citing Perez v. United States, 402 U.S. 146, 151 (1971) and Wickard v. Filburn, 317 U.S. 111, 128–29 (1942)).

167. *Id.* (internal quotation marks omitted). When the regulation is substantially related to commerce, "the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (internal quotation marks omitted) (quoting Lopez v. United States, 514 U.S. 549, 558 (1995)). For example, *Wickard* held that "Congress can regulate purely intrastate [wheat production] that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18.

168. *Id.* at 19.

169. *Id.*

170. *Id.*

of the interstate market, as opposed to the eradication of it, was a difference "of no constitutional import."[171]

One distinction raised by Raich and Monson between their case and *Wickard* was that the record itself in *Wickard* illustrated the economic impact of the aggregate production of wheat, whereas there was no similar record supporting the CSA.[172] But the Court responded that Congress had made *findings* in support of the CSA "to the same effect."[173] The Court noted that its task was not to determine whether Raich and Monson's activities, in the aggregate, affect commerce, but only whether Congress had a rational basis for so concluding.[174] Given the difficulty in distinguishing between marijuana grown in-state or elsewhere, the Court could easily conclude that a rational basis existed for Congress's scheme.[175]

The Court distinguished *Lopez* and *Morrison*,[176] noting that the challenges in those cases were facial challenges, not as-applied challenges.[177] *Lopez* and *Morrison* both involved statutes that did not regulate economic activity,[178] but they recognized that legislation regulating economic activity that substantially affects commerce is lawful.[179] *Lopez* and *Morrison* "cast[ ] no doubt" on the CSA's constitutionality, because the CSA regulated "quintessentially economic" activity.[180]

The Court refused to narrow the relevant class of activities as the Ninth Circuit had done.[181] The CSA regulates marijuana for *any* purpose; the fact that Raich and Monson were using it for medical reasons could not "itself serve as a distinguishing factor."[182] Placing personal medicinal marijuana use outside federal authority would

171. *Id.* at 19 n.29.

172. *Raich*, 545 U.S. at 20.

173. *Id.* While Congress had not made findings specific to medicinal marijuana, it was not generally required to do so. *Id.* at 21.

174. *Id.* at 22.

175. *Id.* Thus, regulation of local marijuana cultivation and possession was a valid exercise of the power to make laws which are "necessary and proper to regulate Commerce . . . among the several States." *Id.* (alterations in original) (internal quotation marks omitted) (quoting U.S. CONST. art. I, § 8).

176. *Raich*, 545 U.S. at 23–27.

177. *Id.* at 23. The Court found this distinction "pivotal" because if the *class* of activities being regulated was within federal reach, the courts could not "excise, as trivial, individual instances" of that class. *Id.* (internal quotation marks omitted) (quoting United States v. Perez, 402 U.S. 146, 154 (1971)).

178. *Id.* at 23–25.

179. *Id.* at 24–25.

180. *Id.* at 25. The Court relied on a dictionary definition of "economics" as "the production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25.

181. *Id.* at 26–29.

182. *Id.* at 27.

place *any* personal use of marijuana or any other drug outside federal control, regardless of whether a state elects to regulate such use.[183] Congress could have rationally concluded that such use would substantially impact commerce.[184]

Finally, Justice Stevens pointed out the alternatives available to Raich and Monson. After identifying the procedures one could use to reclassify a drug under the CSA, the Court noted that "perhaps even more important than these legal avenues is the democratic process, in which the voices of the voters allied with these respondents may one day be heard in the halls of Congress."[185]

### 2. *Justice Scalia's Concurrence*

Justice Scalia filed a concurring opinion, offering a somewhat more intricate explanation of the commerce power. He noted that "activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone."[186] That power comes from the Necessary and Proper Clause[187] and allows Congress to regulate two separate areas: (1) activities which substantially affect interstate commerce; and (2) activities which *do not* themselves substantially affect interstate commerce but are necessary to effectively regulate commerce.[188] Though the two powers often overlap, they are distinct.[189] Justice Scalia thought *Lopez* rejected the contention that Congress can reach noneconomic activity through its attenuated relation to commerce.[190] But such activity *may* be reached when it is "an essential part of a larger regulation of economic activity."[191] In such a case, the Court need only ask whether the means chosen are

183. *Id.* at 28. The Court noted that "[o]ne need not have a degree in economics to understand why a nationwide exemption" for marijuana "cultivated for personal use . . . may have a substantial impact on the interstate market." *Id.*

184. *Id.* at 30. This was supported by the fact that, in the Court's opinion, the CUA was "broad enough to allow even the most scrupulous doctor" to overprescribe, increasing the likelihood that "unscrupulous people" would use the CUA for commercial ends. *Raich*, 545 U.S. at 31–32.

185. *Id.* at 33.

186. *Id.* at 34 (Scalia, J., concurring).

187. *Id.*

188. *Id.* at 34–35.

189. *Id.* at 37.

190. *Raich*, 545 U.S. at 35–36 (Scalia, J., concurring).

191. *Id.* at 36 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)). Thus in *Darby*, Congress had the power not only to exclude goods from commerce, but also to require producers of goods for interstate commerce to conform to wage and hours requirements, and to require those producers to keep employment records to demonstrate compliance. *Id.* at 37.

"reasonably adapted" to attaining a legitimate end.[192] As applied to the CSA, Justice Scalia thought the regulation of personal marijuana possession was so adapted.[193] And although the Necessary and Proper Clause is limited by principles of state sovereignty,[194] regulating areas traditionally left to the states did not violate those principles.[195]

### 3. *Justice O'Connor's Dissent*

Justice O'Connor dissented, noting that the Court "enforce[s] the 'outer limits' of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty."[196] In upholding the CSA, the Court gave Congress "a perverse incentive to legislate broadly," couching "questionable assertions of its authority into comprehensive regulatory schemes."[197] By referring to the "essential part of a larger regulation" language in *Lopez*, Justice O'Connor thought the Court had converted that case into a "drafting guide": if Congress legislates broadly enough, then the activities that such legislation encompasses are within the commerce power's reach.[198]

To prevent Congress from intruding too far into state concerns, Justice O'Connor thought the Court should seek "objective markers" for evaluating legislation, which "allow[ ] Congress to regulate more than nothing . . . and less than everything."[199] In this case, the CUA would be such an objective marker.[200] The Court should thus have evaluated the CSA by sole reference to the "personal cultivation, possession, and use of marijuana for medicinal purposes."[201]

Justice O'Connor also thought the Court's definition of economic was "breathtaking," encompassing production, distribution, and con-

192. *Id.*

193. *Id.* at 39–40.

194. *Id.* at 39.

195. *Raich*, 545 U.S. at 41–42 (Scalia, J., concurring).

196. *Id.* at 42 (O'Connor, J., dissenting).

197. *Id.* at 43.

198. *See id.* at 44–46. Indeed, in applying *Lopez* and *Morrison*'s four considerations, Justice O'Connor found the CSA "materially indistinguishable" from the legislation at issue in those cases. *Id.* at 45.

199. *Id.* at 47. In this regard, Justice O'Connor found fault with the Court for taking the CSA at its face and relying on the fact that "Congress did not distinguish between various forms" of marijuana use. *Raich*, 545 U.S. at 45 (O'Connor, J., dissenting).

200. *Id.* at 48.

201. *Id.*

sumption.[202] *Lopez* suggested that possession itself is not commercial.[203] Even assuming that Raich and Monson's activity was economic, the Government did not show that their activities substantially affected interstate commerce.[204] In Justice O'Connor's opinion, Congress must offer "more than mere assertion" when attempting to reach "local activity whose connection to an interstate market is not self-evident."[205] Unlike *Wickard*, where the Court had before it a summary of the economics of the wheat industry, the Government offered only a series of "bare declarations."[206]

## IV. UNQUESTIONING DEFERENCE AND FAULTY SAFEGUARDS

The Court's treatment of the CSA's validity under the Commerce Clause is troubling in several respects. The Court seemed unwilling to engage in a true as-applied analysis or question the conclusory "findings" offered by the Government in support of the CSA.[207] And the Court's doctrinal treatment is indicative of a reliance on political safeguards that may be misplaced, given the political and social controversy surrounding marijuana in general.[208]

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202. *Id.* at 49. The Court should not uphold federal regulation of *noncommercial* activity simply because it affects the demand for commercial goods, since "[m]ost commercial goods or services have some sort of privately producible analogue." *Id.*

203. *Id.* at 50. Further, *Wickard* did not support federal regulation of home consumption in this case, because the regulation in *Wickard* exempted small plantings—it "did not extend [federal] authority to something as modest as the home cook's herb garden." *Raich*, 545 U.S. at 51 (O'Connor, J., dissenting).

204. *Id.*

205. *Id.* at 52.

206. *Id.* at 54. The majority's *own* arguments justifying federal regulation were "plausible," but were not "borne out in fact." *Id.* at 56. Such a factual demonstration is required before allowing federal regulation over such activity. Justice Thomas also filed a dissent, contending that the Necessary and Proper Clause authorizes only means that are "plainly adapted" to effectuating lawful regulation. *Id.* at 60 (Thomas, J., dissenting). Thus, "there must be an 'obvious, simple, and direct relation' between the intrastate ban and the regulation of interstate commerce." *Raich*, 545 U.S. at 61 (Thomas, J., dissenting) (quoting Sabri v. United States, 541 U.S. 600, 613 (2004) (Thomas, J., concurring)). Because the case was an as-applied challenge, there must be "obvious and plain reasons why regulating intrastate cultivation" of *medicinal marijuana* was necessary to effect an interstate ban; such reasons did not exist. *Id.* at 62 (internal quotation marks omitted). Justice Thomas noted that the "scant evidence" that was available suggested that few people even take advantage of the medicinal marijuana laws, and that such laws have had little effect on law enforcement efforts. *Id.* at 63. Even assuming that regulation of medicinal marijuana use was "necessary," it was not "proper" because it violated principles of federalism. *Id.* at 64–65.

207. *See infra* notes 209–261 and accompanying text.

208. *See infra* notes 262–298 and accompanying text.

### A. Commerce Clause Doctrine

Though it is difficult to find fault with the Court's application of Commerce Clause doctrine in *Raich*, its analysis was not flawless. The Court was unclear about whether it was upholding the CSA facially, or as applied to Raich and Monson's specific activities.[209] And the Court found a rational basis for the CSA's application to Raich and Monson almost solely by taking Congress's word for it.[210]

#### 1. *The Court Called It an As-Applied Challenge, but Analyzed It as a Facial Challenge*

The Court purported to analyze the case as a challenge to the CSA *as applied* to Raich and Monson's activities.[211] But the Court's opinion itself belies that notion. An analysis of the as-applied challenge in this case should have involved determining whether the activity before the Court—the medicinal use of homegrown marijuana—was commercial, and thus could be considered in the aggregate.[212] That was essentially what the Ninth Circuit did; it analyzed whether Raich and Monson's conduct was part of a "separate class of activities" that was beyond the reach of federal power.[213] But the Court rejected this approach, reasoning that Congress itself had rejected it in drafting the CSA.[214] As such, it upheld the application of the CSA to Raich and Monson by the same justifications that supported its application to any intrastate activity, "economic" or not.[215]

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209. *See infra* notes 211–220 and accompanying text.

210. *See infra* notes 221–261 and accompanying text.

211. *See Raich*, 545 U.S. at 15 (characterizing the case as a challenge to the CSA "*as applied* to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law" (emphasis added)). Any doubt about the type of challenge the Court believed it addressed was extinguished by the manner in which the Court distinguished *Lopez* and *Morrison*. It pointed out that those cases involved facial challenges, whereas *Raich* was an attempt to "excise individual applications" of the CSA. *Id.* at 23. An as-applied challenge claims that the activity or product at issue, although technically within the class of activities being regulated, is so different from the rest of the class that the justifications for regulating the class do not specifically apply. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153–54 (1938); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 905–06 (2005).

212. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 138 (2004). Since *Morrison* seemed to limit the aggregation principle to economic activity, see *United States v. Morrison*, 529 U.S. 598, 613 (2000), defining the conduct at issue as noneconomic would preclude aggregation, and the question would become whether the challenger's *specific instance* of activity substantially affected interstate commerce. *See* Metzger, *supra* note 211, at 930 n.252.

213. *See* Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003).

214. *See Raich*, 545 U.S. at 27.

215. *See id.* at 26–27.

This treatment seems to stem from the Court's categorization of the CSA as a "comprehensive regulatory regime,"[216] from which the Court "refuse[d] to excise individual components."[217] Essentially, the Court would not analyze subclasses of activities that the CSA regulated. Rather than determining whether Raich and Monson's specific activities[218] were within federal reach, the Court addressed the CSA's reach into *any* intrastate activity.[219] In doing so, the Court analyzed the case much as it would a *facial* challenge, strongly suggesting that as-applied challenges would not receive a warm welcome in the Commerce Clause context.[220]

### 2. *The Record: The Court Needed More Facts Before Upholding Intrastate Regulation*

Also suspect is the Court's satisfaction with the record and the Government's support for the CSA. The Court disposed of the case in large part by referring to *Wickard*, which it felt was nearly indistinguishable.[221] But there are a number of distinctions between the CSA and the Agricultural Adjustment Act (AAA)[222] at issue in *Wickard* that the Court essentially ignored. In *Wickard*, the parties "stipulated [to] a summary of the economics of the wheat industry."[223] In determining that Congress could have concluded that home-consumed

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216. *Id.* at 27.

217. *Id.* at 22.

218. Their specific activities were the "intrastate manufacture and possession of marijuana for medical purposes pursuant to California law." *Id.* at 15.

219. *See id.* at 22 ("Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.").

220. The Court actually distinguished its decisions in *Lopez* and *Morrison* on this ground. *See supra* note 211. Noting that Raich and Monson were asking the Court to "excise individual applications of a concededly valid statutory scheme," the Court characterized *Lopez* and *Morrison* as involving the assertion that "a particular statute or provision fell outside Congress' commerce power in its entirety." *Raich*, 545 U.S. at 23. When considered with the rest of the Court's opinion, this logic seems to foreclose as-applied challenges to Commerce Clause legislation, at least where there is a "comprehensive scheme" involved; if the statute is *facially* valid, its validity as applied to subclasses of conduct will not be questioned. Although this issue is beyond the scope of this Note, the question of as-applied challenges to commerce regulations has been a subject of ongoing debate. *See, e.g.*, United States v. Stewart, 348 F.3d 1132, 1140–42 (9th Cir. 2003) (concluding that as-applied challenges are available in the Commerce Clause context). *Compare* United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (invalidating federal child pornography laws as applied to "non-commercial, non-economic, simple intrastate possession of photographs for personal use"), *with id.* at 1133 (Trott, J., dissenting) (concluding that the Supreme Court had precluded as-applied Commerce Clause challenges, and that "if the conduct under review falls within the plain language of the statute, precedent requires [courts] to take the statute head on, not carve pieces out of it").

221. *See Raich*, 545 U.S. at 17–24.

222. 7 U.S.C. §§ 1281, 1339 (2000).

223. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

wheat had a "substantial effect" on efforts to stabilize the wheat industry, the Court looked to "the *actual* effects" of Filburn's activity, which had been established by the record.[224] In support of the CSA, however, the Court merely considered Congress's "findings . . . to the same effect" that "[l]ocal . . . possession of controlled substances contribute[s] to swelling the interstate traffic in such substances."[225] The Court essentially implied that unsupported assertions are as adequate a means of demonstrating the propriety of regulations as a detailed economic report. Though the Court said that Congress had a rational basis for bringing home-consumed marijuana within its reach,[226] it is not so clear whether that was the case. Is "we find that X substantially affects commerce because we find that X substantially affects commerce" a *rational* basis?[227] Perhaps the Court was really applying something more akin to a "good story" test: if Congress can come up with a good story supporting the regulation of a particular activity, that will suffice, notwithstanding an absence of factual support.

Another distinction between the CSA and the AAA may be found in the different *objectives* of the regulations. The AAA sought to stabilize and protect the interstate wheat market, whereas the CSA seeks to suppress the interstate marijuana market entirely. The Court dismissed this distinction as being "of no constitutional import" because Congress has the power to pursue either objective.[228] While this may be true,[229] it does not mean the record that is required to uphold each type of legislation should be identical. When Congress sought to stabilize and protect the interstate wheat market, a major reason for upholding the regulation of intrastate wheat consumption was that such activity could affect Congress's aim *without* ever crossing state lines.[230] Empirical data was relatively unnecessary in this context, as it presented something akin to a "zero-sum" situation: as more wheat was produced and consumed at home, the total demand for wheat in interstate commerce necessarily decreased.[231]

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224. *Id.* at 120 (emphasis added).

225. *Raich*, 545 U.S. at 20, 12 n.20 (citing 21 U.S.C. § 801(4) (2000)).

226. *Id.* at 19.

227. Justice O'Connor did not seem to think so, noting that "if the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way," since the VAWA was supported by numerous "findings." *Id.* at 54 (O'Connor, J., dissenting).

228. *Id.* at 19 n.29 (majority opinion).

229. *See, e.g.*, *Wickard*, 317 U.S. 111; The Lottery Case, 188 U.S. 321 (1903).

230. *See Wickard*, 317 U.S. at 128.

231. Indeed, the *Wickard* Court came to this conclusion without referring to any empirical data. *See id.* (noting that homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market"). Only the empirical data re-

By contrast, a more detailed showing may be appropriate when Congress is attempting to suppress an entire interstate market, as with the CSA. The Court suggested three "visions" or purposes for the CSA: (1) to eradicate interstate transactions in marijuana;[232] (2) to limit the supply of marijuana, and thereby drive up the market price;[233] and (3) to eradicate marijuana transactions by driving up the market price (in other words, to achieve (1) through (2)).[234] If (2) were an accurate description of the CSA's goals (if Congress really just wanted to stabilize the market price of marijuana), then the situation would be precisely the same as in *Wickard*; intrastate marijuana growth and consumption would have the same effect on market conditions as Filburn's wheat consumption. But affecting market prices is *not* the aim of the CSA, at least with regard to marijuana—simple possession of marijuana is a criminal offense.[235] Therefore, *Wickard* is not directly analogous. The fact that the CSA attempts to completely prohibit marijuana should have changed the Court's analysis to some extent.

Consider purpose (1), the eradication of the interstate market for marijuana. Here, Congress's ostensible aim is to prohibit a commodity from traveling in interstate commerce. Therefore, intrastate activity—whether production, distribution, or consumption—cannot, by definition, frustrate Congress's goal *unless and until it crosses state lines*. The *Raich* Court offered several explanations of why locally grown marijuana could enter interstate commerce, including the high interstate demand for the substance.[236] But even if one accepts the arguable likelihood that homegrown marijuana *could* enter the interstate market, such a conjecture hardly compels the conclusion that

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garding the specific *levels* of homegrown wheat consumption were important to the Court's decision in that case. *See id.* at 127.

232. *See Raich*, 545 U.S. at 19 n.29 ("To be sure . . . the marijuana market is an unlawful market that Congress sought to eradicate.").

233. *See id.* at 18–19 ("Just as the [AAA] was designed 'to control the volume [of wheat] moving in interstate and foreign commerce' . . . and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets." (second alteration in original) (quoting *Wickard*, 317 U.S. at 115)).

234. *See id.* at 19 ("[O]ne concern prompting inclusion of wheat grown for home consumption in the [AAA] was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market." (citations omitted)).

235. 21 U.S.C. §§ 812(c), 823(f), 844(a) (2000).

236. *See Raich*, 545 U.S. at 19.

homegrown marijuana *will* affect interstate commerce.[237] In *Wickard*, the effect on interstate commerce was evident even without supporting data; the zero-sum nature of the supply-demand relation compelled the Court's conclusion.[238] In terms of the CSA, however, it is impossible to say with any degree of certainty whether homegrown marijuana will actually enter the interstate market, at least without some statistical showing to that effect.[239] Given the vast amount of statistical data that the government compiles about drug use and arrests,[240] it seems rational to require *some* factual showing of homegrown marijuana's effect on interstate commerce. This showing is particularly appropriate when the regulation is attempting to reach wholly intrastate activity and threatening to alter "the distribution of power fundamental to our federalist system of government."[241]

Justice Scalia's concurrence attempted to obviate the need for such findings, arguing that while intrastate medicinal marijuana use may not substantially affect commerce in and of itself, the regulation of such use was necessary and proper for the government's legitimate regulation of interstate commerce.[242] But if a law is not "proper" when it violates state sovereignty,[243] as the Court has recognized, it is difficult to see why this distinction makes a difference. If the Court is indeed concerned with protecting "the Constitution's distinction between national and local authority,"[244] it should demand some factual justification before upholding federal regulation of intrastate activity, whatever the constitutional authority may be. The Government offered no more evidence that regulating Raich and Monson's activities

237. In fact, there is an equally strong, equally conjecturable argument that homegrown marijuana will *decrease* the amount moving interstate. Raich and Monson acknowledged a willingness to purchase marijuana in interstate commerce to meet their needs. *Id.* at 18 n.28. If they were allowed to continue cultivating their own, they would have no need to resort to the interstate market, and the overall amount moving in interstate commerce would therefore decrease.

238. *See supra* note 231 and accompanying text.

239. Justice O'Connor recognized as much in her dissent, noting that "[t]he Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime." *Raich*, 545 U.S. at 56 (O'Connor, J., dissenting).

240. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook (last visited Jan. 19, 2007) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS].

241. *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting).

242. *See id.* at 34–35 (Scalia, J., concurring). It is not so clear that the majority relied on this distinction, framing the issue as whether Congress had a rational basis for concluding that "*respondents*' activities, taken in the aggregate, substantially affect interstate commerce." *Id.* at 22 (majority opinion) (emphasis added). Was the Court referring to Raich and Monson's *specific* activities, or to marijuana cultivation and possession in general?

243. *Id.* at 39 (Scalia, J., concurring).

244. United States v. Morrison, 529 U.S. 598, 615 (2000).

was "necessary" than it did to show that those activities substantially affected interstate commerce. Thus, the "good story" justification simply becomes "we find that regulating X is 'necessary to effectuate' regulating Y because we find that regulating X is 'necessary to effectuate' regulating Y."

Adopting vision (3) is another way of reducing the utility of empirical evidence by analogizing the operation of the CSA to that of the AAA in *Wickard*. The Court noted that the AAA had controlled intrastate wheat production in an effort to prop up and stabilize market prices.[245] Similarly, the Court said that the CSA was meant to "control the supply and demand of controlled substances" in interstate commerce.[246] The argument was that the CSA, by completely suppressing intrastate marijuana manufacture, artificially drives up the price of marijuana beyond what the interstate market will bear, thereby indirectly suppressing the interstate market itself.[247] In that sense, the Court reasoned, the CSA's regulation of "price and market conditions" operated much like the AAA in *Wickard*.[248] As such, the effect of Raich and Monson's activities on interstate commerce, much like Filburn's in *Wickard*, might be ascertainable without empirical data on the record and might justify the Court's reliance on conclusory "findings" in upholding the CSA.

But even this characterization of the CSA is unpersuasive in explaining why the Court did not demand a stronger statistical showing from the Government. First, it strains credulity to suggest that the CSA is regulating the price of a commodity that it seeks to prohibit altogether.[249] Second, it is questionable whether such a scheme is even rational; if the CSA successfully suppressed all intrastate marijuana cultivation, then the price of marijuana would (under the Government's theory) increase to the point of extinguishing interstate transactions in the substance. But then there would be no demand, and the price of marijuana would fall again—just as it would if the intrastate cultivation *was not* suppressed—and interstate marijuana

245. *Raich*, 545 U.S. at 17.

246. *Id.* at 19.

247. This argument, while not specifically articulated by the Court, was raised by the Government at oral argument. *See* Transcript of Oral Argument at *18, *Raich*, 545 U.S. 1 (No. 03-1454), 2004 WL 2845980 [hereinafter *Transcript*].

248. *Raich*, 545 U.S. at 19.

249. It could be argued that Congress's goal—to prohibit commerce in marijuana altogether—does not affect the validity of the supply-demand theory of the CSA, because the Court no longer asks whether there is a "pretext" for congressional action. *See* United States v. Darby, 312 U.S. 100, 113 (1941). But in terms of the CSA, there is no question of a hidden pretext—the statute *itself* outlaws marijuana trafficking. The question is merely whether it is rational for Congress to regulate by statute the price and market conditions of a market it seeks to eradicate.

commerce would increase. It hardly seems "rational" to implement a system of suppression that will eventually achieve the same result that *nonsuppression* would achieve—low market prices for marijuana.[250]

The Court was unclear about which "vision" of the CSA it found rational, and with good reason—none of them are supportable absent some empirical data. Despite all these reasons for making Congress "show its work," the Court simply accepted that Raich and Monson's activities substantially affected interstate commerce, or that regulation of their activities was necessary to effectuate the CSA (it did not really seem to care which). The Court did so despite the absence of any statistical support for those assertions.[251] In fact, the only evidence on the record suggested that medicinal marijuana laws had "little impact" on law enforcement activities.[252]

One may ask why this is problematic. If intrastate marijuana possession (just like the wheat in *Wickard*) may be reached by Congress, why is it constitutional to regulate it in one way (for stabilization of the market price) and not in another (for eradication of the market)? The answer is doctrinal: the Court requires at least a "rational basis" for commerce regulation, and the structure of the CSA is simply not rational. But more importantly, *some* limitations on federal power must be fixed by the judiciary; otherwise, individuals ultimately suffer as a result.[253]

Some commentators advocate that courts show more deference to Congress and discourage the insistence on factual support for legislation.[254] One argument for deference is based on pragmatic concerns, such as the idea that because the Court showed so much deference to Congress for most of the mid-twentieth century, legislators making laws during that time would not have developed records to prepare for the Court's demands for factual findings in cases like *Lopez*.[255]

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250. This may be why the Court had such a hard time discussing the "market price" theory with a straight face. *See Transcript*, *supra* note 247, at *32–33.

251. The only statistical data cited by the Court was the amount of marijuana that the CUA allowed patients to possess. *Raich*, 545 U.S. at 31 n.41. But nothing the Court cited pertained to its likelihood to move in interstate commerce.

252. GEN. ACCOUNTING OFFICE, MARIJUANA: EARLY EXPERIENCES WITH FOUR STATES' LAWS THAT ALLOW USE FOR MEDICAL PURPOSES 32 (2002) (cited in *Raich*, 545 U.S. at 63 (Thomas, J., dissenting)), *available at* http://www.gao.gov/new.items/d03189.pdf. The report, which was based on interviews with federal and local law enforcement officials, also noted that none of the federal officials interviewed had indicated that medicinal marijuana laws—including those in California—were being abused. *See id.* at 36.

253. *See infra* notes 320–333 and accompanying text.

254. *See, e.g.*, William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

255. Colker & Brudney, *supra* note 254, at 105–11.

Another argument attacks the Court's need for factual support for legislation as being "rooted in an illegitimate judicial distrust of Congress"[256] and contrary to separation of powers principles.[257] But this Note contends that such arguments are unconvincing. First, to the extent that these arguments rely on the political safeguards of federalism,[258] they rest on a premise that may itself be suspect—that the political process is an adequate substitute for judicial scrutiny.[259] Second, a little "judicial distrust of Congress" may be a good thing in some contexts. As a way of setting limits on federal actions, "the Constitution gives courts both the power and duty to determine whether acts of Congress have exceeded [its] enumerated powers."[260] While it may be undesirable to allow courts to scrutinize Congress's *policy reasons* for legislating, "deference to congressional judgment as to its *power* to legislate under the Commerce Clause is inappropriate" and "incompatible with the system of checks and balances crafted by the Framers."[261]

### *B. The Court's Reliance on Political Safeguards*

The Court's treatment of the as-applied analysis, the factually inadequate record, and the less-than-rational scheme of regulation all indicate its reliance on political safeguards. The Court itself subtly acknowledged this reliance. In response to concerns that its decision in *Raich* might encourage Congress to legislate broadly, the Court noted the "political checks" that would prevent Congress from "enact[ing] a broad and comprehensive scheme for the purpose of targeting purely local activity."[262] As an alternative to judicial relief, the Court advised Raich and Monson that their best recourse "is the democratic process, in which the voices of voters" may be heard by Congress.[263] The Court's Commerce Clause jurisprudence has often relied on the political safeguards theory and, with the exception of a handful of cases, the Court has been content to leave federalism in the hands of politicians.[264]

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256. Buzbee & Schapiro, *supra* note 254, at 160.

257. *See id.* at 160; Colker & Brudney, *supra* note 254, at 144.

258. *See* Colker & Brudney, *supra* note 254, at 144.

259. *See infra* notes 262–298 and accompanying text.

260. David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1089 (1996).

261. *Id.* at 1091 (emphasis added).

262. Gonzales v. Raich, 545 U.S. 1, 25 n.34 (2005).

263. *Id.* at 33.

264. *See supra* notes 64–82 and accompanying text.

But it is not so clear that the Court's reliance on political safeguards is well founded. There have been many criticisms of the theory, and the problems with relying on Congress to represent the states are illustrated by the CSA.[265] And while some argue that the state political systems provide another level of protection, the passage of the CSA suggests that even state governments are not always interested in maintaining the federal balance.[266]

### 1. *Flaws in the System Undermine the Role of Federal Politics as a Safeguard of Federalism*

There have been many reasons proffered as to why the political process may be an ineffective guardian of federalism. Federal officials want to appear responsive to their constituencies and may try to effect this aim by "providing desired services themselves—through the *federal* government—rather than [giving] or shar[ing] credit with *state* officials."[267] If state interests that are represented by a majority in Congress happen to concur, "interests in the rest of the country will be subordinated."[268] These results may not be problematic with respect to legislation that Congress is constitutionally empowered to enact, because the Constitution does not demand unanimous congressional approval for legislation. But if one accepts that there is an abstract limit on federal power imposed by the Constitution and principles of federalism,[269] then flaws in the political safeguards in a given case would reinstate the need for judicial scrutiny. From time to time, particular flaws have caused the Court to engage in such review.[270]

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265. *See infra* notes 267–284 and accompanying text.

266. *See infra* notes 285–298 and accompanying text.

267. Kramer, *supra* note 9, at 1511 (emphasis added). For example, Congressman *A*, whose constituency (State *A*) wants a prohibition on marijuana, will want to respond. Since Congressman *A* can act only on a federal level, his only available response would be a federal ban on marijuana—like the CSA.

268. *Id.* Thus, if the constituencies of states *B*, *C*, and *D* (and their congresspeople) also seek a marijuana prohibition, the CSA will pass, and those states who do not wish to prohibit marijuana will be foreclosed from obtaining that marijuana on the interstate market (or at all, as with the actual CSA).

269. At least one of the Framers held this view: Thomas Jefferson believed that Congress should be strictly limited to its enumerated powers, expanded by the Necessary and Proper Clause only to "means without which the grant of power would be nugatory." Christopher J. Parosa, Comment, *Federalism: Finding Meaning Through Historical Analysis*, 82 OR. L. REV. 119, 134–35 (2003) (quoting THOMAS JEFFERSON, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), *in* THOMAS JEFFERSON: WRITINGS 416, 419 (Merrill D. Peterson ed., 1984)).

270. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

One such situation is where there is a danger of obscuring or interfering with political accountability.[271] The Court has been wary of federal action that reduces the ability of the people to know *which* government to hold accountable for a given action.[272] The CSA, particularly in the case of medicinal marijuana, presents a similar problem. Every state has laws that prohibit the recreational use of marijuana.[273] That the CSA and various state laws overlap is evidenced by the *Raich* case itself—Monson was investigated for her marijuana possession by both federal and state agents.[274] Such overlapping jurisdiction makes it difficult for voters to determine which authority is regulating them in a given realm.[275] Marijuana is a perfect example. When *Raich* was decided, at least nine states had enacted laws legalizing some form of medicinal marijuana use.[276] Eight of these states had adopted the laws through the use of a ballot initiative.[277] This method of action offers a rare opportunity to observe how voters perceive the authority to which they are subject. By adjusting these laws, voters apparently wanted to exempt medicinal marijuana users from prosecution and thought that altering state law would be sufficient. It is hard to believe that the citizens in these states would go to the trouble of proposing the medicinal marijuana exemptions, garnering support for them, and voting them into law, all the while knowing that their efforts would be usurped by federal authorities. These voters thought (albeit mistakenly) that they were effecting a change in the laws of the government that was responsible—and *accountable*—for enforcing marijuana laws in their state. If problems with accountability trigger the Court to supplement political safeguards,[278] it is difficult to see why the Court so readily took the Government at its word in *Raich*.

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271. "Accountability," for purposes of this Note, refers to "the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation." Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005).

272. *See supra* notes 75–82 and accompanying text.

273. NORML: State by State Laws, http://www.norml.org/index.cfm?Group_ID=4516 (last visited Jan. 19, 2007). The severity of these laws varies widely from state to state, with some states (such as Texas) imposing a $1,000 fine and up to one year in jail for possession of less than two ounces of marijuana, and others (such as Alaska) imposing no penalty or sanction whatsoever for less than four ounces. *Id.*

274. Gonzales v. Raich, 545 U.S. 1, 7 (2005).

275. *See* Rubin, *supra* note 271, at 2086–87.

276. *Raich*, 545 U.S. at 5.

277. *See* K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 223 & n.12 (2005). Ballot initiatives allow citizens to place legislation on the ballot by petition, for voter approval. *Id.* at 221 n.2.

278. *See* Printz v. United States, 521 U.S. 898, 957 (1997) (Stevens, J., dissenting).

Another flaw in the political safeguards is exposed by "public choice" theory. This theory suggests that small, well-defined interest groups with specific, intense goals will be disproportionately effective in influencing politics and legislation.[279] There are numerous organizations that lobby to maintain federal antidrug laws; several of them supported the Government in *Raich*.[280] Unlike states wishing to protect their boundaries from lottery tickets, the interests of these groups do not stop at state lines; their goals are not concerned with "federalism" at all.[281] Many of these groups are actually staunch supporters of the federal regulation of intrastate drug use. These groups will find a ready ear in federal legislators (or at least those legislators who want to be reelected).[282] The case of medicinal marijuana is, again, a perfect example: surveys show that a vast majority of Americans favor legalizing marijuana for medicinal purposes.[283] Despite this fact, numerous proposals in Congress to legalize medicinal marijuana have

279. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1884–86 (1992). This stems not only from the difficulty in mobilizing a large group to political action, but also from the lack of intensity with which members of a large, diffuse group may support a common position. *Id.* at 1185–86. Professor Issacharoff uses the example of gun control:

> Surveys routinely show that a majority of Americans favors some form of gun control. Nonetheless, that broad majority is unable to organize itself and is unable to deliver votes on the basis of intensity of preference on the issue of gun control alone. Politicians may vote against gun control yet secure the support of gun-control backers on other issues. By contrast, opponents of gun control, organized in a well-disciplined group through the National Rifle Association, will be informed of the position of any candidate on the gun control question and will vote against pro-gun control candidates on that issue alone. As a result, candidates can be assured of few guaranteed votes based on a pro-gun control plank but will assuredly lose a significant number of votes because of such a position. Thus, despite majority sentiment in favor of regulation, the smaller, well-organized gun lobby is able to exert disproportionate influence in the political process and thwart attempts at regulation.

*Id.* (citations omitted). This is, admittedly, a small fraction of the larger, more complex idea of "public choice," which is beyond the scope of this discussion. For a comprehensive exposition, see GORDON TULLOCK ET AL., GOVERNMENT: WHOSE OBEDIENT SERVANT? A PRIMER IN PUBLIC CHOICE (2000).

280. The Drug Free America Foundation, Drug Free Schools Coalition, Save Our Society from Drugs, and Students Taking Action Not Drugs co-authored an amicus brief supporting the CSA. Brief of the Drug Free America Foundation, Inc. et al., as Amici Curiae in Support of Petitioner, *Raich*, 545 U.S. 1 (No. 03-1454).

281. It has even been suggested that, following the repeal of the Eighteenth Amendment, alcohol manufacturers lobbied for federal marijuana prohibition, as marijuana was viewed as cheaper competition for alcohol. *See* Ronald Timothy Fletcher, Note, *The Medical Necessity Defense and De Minimis Protection for Patients Who Would Benefit from Using Marijuana for Medical Purposes: A Proposal to Establish Comprehensive Protection Under Federal Drug Laws*, 37 VAL. U. L. REV. 983, 990 (2003).

282. *See* Issacharoff, *supra* note 279 and accompanying text.

283. In 2003, 75% of Americans advocated such legalization. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 240, tbl.2.69, http://www.albany.edu/sourcebook/pdf/t269.pdf.

been unsuccessful.[284] This is an obvious case of the political safeguards failing. Representatives in Congress, far from being concerned with protecting federalist lines, are not even concerned with advancing the will of their state's majority. The extent to which Congress serves federalism is determined by the extent to which federalism can sway votes. Where the political process is safeguarding special interests, and not federalism, it may be appropriate for the Court to engage in a more searching review of the "necessity" of the regulation.

### 2. *State Governments Will Not Protect the Federal Balance Against Their Own Interests*

Even despite some recognized flaws in the political safeguards theory, it has been supported by reference to another level of protection for the states—state governments themselves. If Congress overreaches the limits on its power at the expense of the states, state governments—which are, theoretically, closer to their constituencies than the federal government—can "rally opposition" among state residents, and thus eventually restore the federal balance.[285] But as the situation with the CSA illustrates, it is not altogether clear that state governments (or even the constituents themselves) will oppose every intrusive federal action. It is important to consider the existing public opinion on the subject of the legislation as well as the fact that politicians try to be responsive to that opinion.[286] Between 1972 (the CSA was enacted in 1970) and 2003, polls show that anywhere from 62% to 81% of Americans favored the prohibition of marijuana.[287] And voter support for prohibition on a state level arose long before the CSA, with the first state banning marijuana in 1913.[288] Regardless of whether it was within federal power, a majority of Americans wanted marijuana prohibited on a *state* level, and their state governments responded.

The CSA, by criminalizing marijuana at the federal level, gave the federal government jurisdiction to investigate and prosecute individu-

284. To be more accurate, such bills, which have attempted to reclassify marijuana under the CSA, have been referred to House subcommittees and have never been heard from again. *See, e.g.*, H.R. 912, 106th Cong. (1st Sess. 1999); H.R. 1782, 105th Cong. (1st Sess. 1997). A similar bill was most recently introduced—and referred to subcommittee—in May of 2005. *See* H.R. 2087, 109th Cong. (1st Sess. 2005).

285. *See* Kramer, *supra* note 8, at 257–65.

286. *See* Issacharoff, *supra* note 279, at 1884–86.

287. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 240, tbl.2.67, http://www.albany.edu/sourcebook/pdf/t267.pdf. This opinion long preceded the passage of the CSA; the first poll, conducted one year before the enactment of the CSA, showed the highest level of support for prohibition, 84%, of any year of polling. *Id.*

288. Gonzales v. Raich, 545 U.S. 1, 5 (2005).

als possessing or cultivating marijuana.[289] The DEA, which was created within the Department of Justice in 1973,[290] immediately began to enforce the CSA, including the marijuana ban. The creation of the DEA added an initial 1470 special agents, and nearly seventy-five million dollars in funding, to the states' existing resources for prosecuting marijuana possession, all dedicated to narcotics enforcement.[291] By 2003, those numbers had risen to nearly 5000 DEA special agents, and nearly two billion dollars in funding.[292] The DEA has seized 5,301,258 kilograms—nearly twelve million pounds—of marijuana since 1986.[293] And over the past ten years, the DEA has arrested over 81,000 people for marijuana violations.[294] In addition, federal jurisdiction over marijuana has allowed for the creation of the Domestic Cannabis Eradication/Suppression Program (DCE/SP), through which the DEA provides "training, equipment, investigative and aircraft resources" to participating state and local law enforcement agencies.[295] Working with these agencies, the DCE/SP was responsible in 2004 for eradicating over three million cultivated marijuana plants, for seizing over one hundred thousand pounds of processed marijuana, and for arresting over 8000 people for marijuana distribution.[296]

What does all this mean? It means that state and local governments, as well as their constituents, have strong incentives to favor a law like the CSA that gives the federal government jurisdiction over intrastate marijuana possession. The DEA itself takes millions of

289. 21 U.S.C. §§ 841(a)(1), 844(a) (2000). In fact, until 1968, the only federal agency involved in regulating marijuana trafficking—the Bureau of Narcotics—was part of the Department of the Treasury, and oversaw the collection of taxes on marijuana pursuant to the Marihuana Tax Act, Pub. L. 75-238, 50 Stat. 551 (repealed 1970). U.S. Drug Enforcement Administration, Inside the DEA, Genealogy, http://www.dea.gov/agency/genealogy.htm (last visited Jan. 19, 2007).

290. U.S. Drug Enforcement Administration, DEA History Book, 1970–1975, http://www.dea.gov/pubs/history/1970-1975.html (last visited Jan. 19, 2007). The DEA was intended to consolidate CSA enforcement efforts from the former Office for Drug Abuse Law Enforcement and Office of National Narcotics Intelligence.

291. *Id.*

292. U.S. Drug Enforcement Administration, DEA History Book, 1999–2003, http://www.dea.gov/pubs/history/1999-2003.html (last visited Jan. 19, 2007).

293. U.S. Drug Enforcement Administration, DEA, Statistics, http://www.dea.gov/statistics.html (last visited Jan. 19, 2007).

294. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 240, tbl.4.40, http://www.albany.edu/sourcebook/pdf/t440.pdf.

295. *Id.* tbl.4.38.2004, http://www.albany.edu/sourcebook/pdf/t4382004.pdf. The DCE/SP provides a limited amount of direct funding to state and local law enforcement agencies as well. But because the issues involved in the federal government's exercise of the spending power are somewhat different, this Note focuses on incentives in the form of the nonliquid resources the program offers.

296. *Id.*

pounds of marijuana off the streets, and the DCE/SP gives local law enforcement agencies the resources to assist in those efforts. Thus, the aforementioned majority of citizens that favor marijuana prohibition see that goal realized on a local level, either by the DEA (whose funding comes from taxes diffused across the country) or from their state or local law enforcement agencies (whose efforts are subsidized by access to federal resources and investigative technology). State and local governments, anxious to appease voters decrying recreational marijuana use in their communities, are not only able to point to the thousands of marijuana-related arrests each year and the accompanying marijuana seizures, but they are able to do so without imposing unpopular tax increases on their constituents or taking money away from education and other programs.[297] Everybody wins, in large part because the CSA allows the federal government to be involved in drug enforcement on a local level.

The CSA may or may not be constitutional; it is not the goal of this Note to make that determination. But assuming *arguendo* that the CSA is unconstitutional, who is going to oppose it? Not Congress, if it was enacted in response to pressures from special interests.[298] Not state governments, so long as they are reaping the benefits of meeting public demands at little cost. And not the citizenry itself, as long as recreational drugs are kept off the streets without significant tax increases. If the CSA offends the federal balance, it does so by means of an "end around" the political safeguards.

## V. FEDERAL POWER UNCHECKED, FEDERALISM'S BENEFITS UNREALIZED

The Court's decision in *Raich* could very well have a substantial impact on the Commerce Clause landscape. The apparent abrogation of as-applied challenges, combined with the further development of the "comprehensive scheme" principle, severely limits the available challenges to commerce legislation.[299] And the Court's willingness to uphold the regulation of local activities without any real showing of necessity enables Congress to justify its actions with ease. Most importantly, however, the doctrinal developments in *Raich* allow Con-

297. State and local governments are probably able to take credit for the efforts of federal agencies in drug enforcement because the lines of political accountability are skewed in this area. *See supra* notes 271–278 and accompanying text.

298. *See supra* notes 279–284 and accompanying text.

299. *See infra* notes 301–319 and accompanying text.

gress to reach into the states to an extent that threatens to obliterate the very benefits to individuals that federalism is intended to create.[300]

### A. Raich *Leaves Almost No Limits on the Reach of the Commerce Power*

Justice O'Connor, in dissent, noted that the Court's decision in Raich essentially turned *Lopez* into a "drafting guide."[301] It is hard to argue otherwise. The considerations that guided the Court's decisions in *Lopez* and *Morrison*—the economic nature of the activity, the existence of findings, the jurisdictional element, and the presence of a comprehensive scheme[302]—are still present in the substantial effects analysis. But *Raich* seems to give Congress an example of how to satisfy those considerations to reach nearly any activity it desires.

The jurisdictional element prong is easy to satisfy.[303] If Congress is attempting to reach an activity that involves some object or instrument, it need only draft the statute to apply to any such object that has moved in interstate commerce. The clearest example of this is the GFSZA at issue in *Lopez*. After the Court invalidated the GFSZA, Congress amended the statute to apply only to guns that "[had] moved in or that otherwise affect[ed]" interstate commerce.[304] Because the existence of a jurisdictional element spares the statute in question from the more demanding substantial effects analysis,[305] it allows Congress to regulate conduct under the pretense of regulating objects.[306] This is the most "glaring fault" with the jurisdictional element: "[I]t [can] be exploited by Congress to uphold any Commerce Clause statute."[307]

*Raich* indicates that the only thing easier to provide than a jurisdictional element is a set of "findings." As long as Congress puts forth a list of assertions that *if true* would support the claimed connection to commerce, the Court will be satisfied.[308] In *Raich*, the Court did not

300. *See infra* notes 320–333 and accompanying text.

301. Gonzales v. Raich, 545 U.S. 1, 46 (2005) (O'Connor, J., dissenting).

302. *See supra* notes 107–110 and accompanying text.

303. *See supra* note 95 and accompanying text.

304. 18 U.S.C. § 922(q)(2)(A) (2000). This version of the statute has already been upheld by the Eighth Circuit against a Commerce Clause challenge. *See* United States v. Danks, 221 F.3d 1037 (8th Cir. 1999).

305. *See* McGimsey, *supra* note 95, at 1679–81.

306. The Court will no longer question this pretense. *See* United States v. Darby, 312 U.S. 100, 113 (1941). Thus, if Congress wanted to regulate the sugar intake of American citizens, it could constitutionally prohibit the possession of chocolate bars that had moved in interstate commerce under the guise that it was regulating the chocolate, not individuals' diets.

307. Dral & Phillips, *supra* note 119, at 627–28.

308. *See supra* notes 221–252 and accompanying text.

question the methods or data used to generate those findings, or even whether such data exist. The Court seems to be saying, "give us a story—as long as it's not *too* farfetched (i.e., *Lopez*), we'll accept it."

This blind acceptance of "bare declarations"[309] is not particularly significant with respect to findings about Congress's reasons for legislating or the wisdom thereof.[310] There may even be reasons for judicial deference to such findings; the role of courts in Commerce Clause review is to determine whether Congress *can* legislate in a certain area, not whether Congress *should*. But *Raich* seems to sanction judicial deference not only to these findings of policy, but also to what could be called "jurisdictional" findings—those findings that provide support for Congress's exercise of authority.

The effects of this deference are best illustrated by the final two factors—the economic nature of the activity and the existence of a comprehensive scheme—considered by the Court in *Lopez*, *Morrison*, and *Raich*. *Lopez* and *Morrison* suggest that Congress may not aggregate the effects of noneconomic activity in order to show a substantial effect on commerce.[311] Under this principle, presumably, if Raich and Monson's activities had been termed noneconomic,[312] the effect of their conduct could not be considered in the aggregate, and it would be difficult to see how their medicinal marijuana use substantially affected interstate commerce. But *Lopez* and *Raich* recognize an exception to this nonaggregation principle where the activity being regulated is part of a larger regulatory scheme that would be undercut unless the noneconomic activity were included.[313] So how does the Court determine whether the regulated activity in a given case is an "essential part of a larger regulation"?[314] *Raich* suggests that it should simply ask Congress—or more accurately, examine Congress's "findings." Specifically, the Court looked at findings asserting that the regulation of intrastate marijuana possession was essential to regulating interstate marijuana possession.[315] In short, the Court took Congress's word for it.

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309. Gonzales v. Raich, 545 U.S. 1, 54 (2005) (O'Connor, J., dissenting).

310. For instance, consider Congress's determination that illegal possession or use of controlled substances has "a substantial and detrimental effect on the health . . . of the American people." 21 U.S.C. § 801(2) (2000).

311. *See supra* note 111 and accompanying text.

312. This is assuming, of course, that the Court would undertake an analysis of the CSA as applied to their specific activities—a dubious assumption after *Raich* itself. *See supra* notes 211–220 and accompanying text.

313. *See Raich*, 545 U.S. at 22–25; United States v. Lopez, 514 U.S. 549, 560 (1995).

314. *Lopez*, 514 U.S. at 561.

315. These are the type of jurisdictional findings referred to above. *Raich*, 545 U.S. at 12–13.

What this means is that the doctrinal limitations on the scope of the commerce power have been eliminated. When the Court reviews commerce legislation under the "instrumentalities" or "channels" prongs, the analysis is typically very deferential, and generally results in the validation of the act in question.[316] *Lopez* and *Morrison* seemed to indicate that, at least in the substantial effects prong, the Court may still have been willing to impose some limitations on Congress's authority over intrastate affairs. But after *Raich*, those limitations may have eroded. If Congress wishes to regulate purely intrastate, noneconomic activity of virtually any type it chooses, it has a host of options to insulate itself from constitutional challenge. Congress can attach a jurisdictional element, pulling the legislation into the instrumentalities prong, and thereby receiving more lenient review.[317] Congress can also include the activity within a larger scheme, thus shielding it from the economic/noneconomic analysis.[318] All Congress needs to do to convince the Court that the activity is an "essential" part of that larger scheme is include a "finding" to that effect, which the Court seems to accept unquestioningly. And should Congress fail to utilize one of these options, it still need not fear that the Court will find the subject of legislation to be noneconomic—the Court's "exceedingly broad" definition of economic[319] puts that threat to rest. *Raich* gave Congress all the necessary tools to get around the Court's doctrinal limits on regulation of intrastate activities, rendering those limits nugatory.

### *B. The Limitless Reach of the Commerce Power Prevents Individuals from Realizing Federalism's Benefits*

So what? There are many who reject the notion of "states' rights" insofar as it suggests that states should have a judicial remedy for any federal intrusion.[320] And if, as Wechsler proposed, courts are on their

316. *See* McGimsey, *supra* note 95, at 1680.

317. *See supra* note 95 and accompanying text.

318. Justice O'Connor argued that under the majority's reasoning, if Congress included the GFSZA within a statute prohibiting the "transfer or possession of a firearm anywhere in the nation," it would have been upheld in *Lopez*. *Raich*, 545 U.S. at 46 (O'Connor, J., dissenting) (internal quotation marks omitted).

319. Randy E. Barnett, *Foreword: Limiting* Raich, 9 LEWIS & CLARK L. REV. 743, 749 (2005); *accord supra* note 180 and accompanying text.

320. *See generally* Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights,"* 46 WM. & MARY L. REV. 213, 282 (2004) (arguing that "[s]tates' rights are not merely the flip side of the powers coin" that would entitle states to judicial enforcement of limitations on federal power (internal quotation marks omitted)). *But cf.* Baker & Young, *supra* note 11, at 135–39 (refuting the justifications for judicial nonenforcement of federalism limitations on national power).

"weakest ground" when invalidating federal legislation on federalism grounds,[321] that would seem especially true where, as with the CSA, invalidation on federalism grounds may contradict the will of not only the federal and state governments, but the citizens themselves.[322] But for those who would reserve judicial resources for the protection of individual rights,[323] it is important to realize that our federalist system is in many respects a guardian of *individual* values rather than states' rights.[324] Angel Raich and Diane Monson are unique examples of how federalism serves individuals, and how the expansion of federal power can harm individual interests.

First, federalism serves individuals by providing a diverse array of "legal regimes" from which citizens can choose.[325] This not only allows individuals to "vote with their feet"[326] by moving to states that reflect their legal positions. It also allows citizens to have a stronger voice in local legislation by means of ballot initiatives and other direct voting mechanisms, which are not available on the federal level.[327] The citizens of California chose to create a legal exemption for medicinal marijuana use, apparently finding it to be of a different moral character than recreational marijuana use. Federalism allows citizens of a particular state to draw such distinctions, and enact or support state legislation accordingly. And it allows individuals such as Angel Raich and Diane Monson to reap the benefits of that legislation by living in (or moving to) a state that allows them legal access to what they feel is the most effective remedy for their multitude of maladies. Intrusive federal legislation such as the CSA allows none of these things.

Second, federalism allows the states to act as "critical staging grounds" for changing national policy.[328] By allowing states to act as laboratories for democracy,[329] other states may see the results of ex-

321. *See* Wechsler, *supra* note 8, at 559.

322. *See supra* notes 267–298 and accompanying text.

323. *See* Choper, *supra* note 8.

324. Even opponents of the "political safeguards" judicial philosophy "concede that states' rights have no independent value; their worth derives entirely from their utility in enhancing the freedom and welfare of individuals." Baker & Young, *supra* note 11, at 135.

325. *See id.* at 139.

326. Young, *supra* note 212, at 54 (quoting Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS., Winter 1992, at 147, 150).

327. *See* DuVivier, *supra* note 277, at 222.

328. *Cf.* Baker & Young, *supra* note 11, at 137–38.

329. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

perimental legislation and adopt it themselves. Thus, changes in policy can gain support on a state-by-state level until that support is sufficient to influence federal policy.[330] Medicinal marijuana again provides a useful illustration. Since California enacted the CUA in 1996, eight more states have adopted similar medicinal marijuana laws.[331] Given the recent number of attempts at reforming the CSA's classification of marijuana,[332] it may be that medicinal marijuana will eventually gain enough support to make those attempts successful. But by allowing the CSA to reach purely intrastate activity, the Court publicly validated the exercise of federal power and may have discouraged states from further experimentation in that area.[333]

All this is not meant to imply that the CSA is unconstitutional or that the federal government lacks authority to reach any "purely intrastate" activity. The point is that questions of states' rights do have profound impacts on individual values. As such, constitutional challenges based on questions of federalism deserve no less scrutiny, and no more deference to Congress, than questions of individual rights.

## VI. CONCLUSION

The *Raich* decision has removed most—if not all—of the doctrinal limitations on the reach of the commerce power. It has done so at the expense of the individual values that federalism is designed to protect. But it may yet be possible for the Court to limit the effects of this decision if it chooses. One avenue is to recognize the as-applied challenge in the commerce context. Although it seems like the Court rejected this option in *Raich*, there is language in the opinion that could support another reading.[334] Analysis of a given regulation by reference to the specific activity at issue in a particular case would, at a minimum, limit Congress's reach to those activities that actually affect interstate commerce in some way. Another option would be to simply demand a stronger showing on the record of the claimed connection

330. *Cf.* Baker & Young, *supra* note 11, at 137–38.

331. *See* DuVivier, *supra* note 277, at 283–86. Specifically, the states are Alaska, Arizona, Colorado, Maine, Montana, Nevada, Oregon, and Washington. *Id.*

332. *See supra* note 284 and accompanying text.

333. In fact, the *Raich* ruling prompted California to suspend its identification card program for medicinal marijuana users. It also prompted the governor of Rhode Island to veto a similar law enacted just one day after the ruling. *Health Highlights: California Suspends Medical Marijuana I.D. Card Program*, HEALTH DAY, July 9, 2005, 2005 WLNR 10775585.

334. At some points, the Court analyzed the CSA in terms of all "intrastate manufacture and possession of marijuana"; at others, in terms of "respondents' activities." Gonzales v. Raich, 545 U.S. 1, 22 (2005). While the former suggests a facial analysis of the statute, the latter may suggest an as-applied analysis—since it arguably refers to "the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law." *Id.* at 15.

to commerce, at least in terms of the jurisdictional findings.[335] Although *Raich*'s treatment of congressional findings is very deferential, the ongoing shift in the Court's personnel may be accompanied by a shift in attitude.[336]

As it stands, there are few areas that remain off limits to federal regulation. Time will tell if the Court will reestablish some limitations and retreat from its deference to Congress, or whether the federal government will forevermore be able to regulate "quilting bees, clothes drives, and potluck suppers throughout the 50 States."[337]

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335. *See supra* note 315 and accompanying text.

336. There has been some speculation that new Chief Justice John Roberts Jr. is "willing[ ] to closely scrutinize acts of Congress to ensure they are a proper exercise of the Commerce power." Jeff Bleich et al., *The New Chief*, 66 OR. ST. B. BULL., Nov. 2005, at 18, 23. And the newly confirmed Justice Samuel Alito may share a similar willingness, if anything is to be gleaned from his dissent in *United States v. Rybar*. 103 F.3d 273 (3d Cir. 1996) (upholding the regulation of intrastate machine gun possession on the grounds that such possession could facilitate violent crime which could affect interstate commerce). Then-Judge Alito noted that his "problem with [the Government's theory] is that it rests on an empirical proposition for which neither Congress, the Executive (in the form of the government lawyers who briefed and argued this case), nor the majority has adduced *any appreciable empirical proof*." *Id.* at 292 (Alito, J., dissenting) (emphasis added).

337. *Raich*, 545 U.S. at 69 (Thomas, J., dissenting).

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